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In The Supreme Court of the United States

October Term, 1980

TRANSCO SECURITY INC. OF OHIO
and FRED GAVIGLIA
Petitioners

vs.

ROLAND G. FREEMAN, III,
ADMINISTRATOR, and GENERAL
SERVICES ADMINISTRATION
Respondents

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) May a federal agency suspend a government contractor, whose business is exclusively with the federal government, from doing any business with the federal agency for as long as eighteen months without a meaningful opportunity to be heard; and

(2) May such suspension be thus effected when: (A) The suspension is to be followed by printed notice circulated to all United States federal agencies that the contractor has been suspended for "fraud"; and (B) the suspension is accompanied by affirmative actions of the suspending agency which impede and deter the doing of business by the government contractor with other non-suspending federal agencies?*

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*All parties to the proceeding are listed in the caption of this Petition.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Appendix A) is reported at 639 F.2d 318. The order of the United States District Court for the Southern District of Ohio (Western Division) and that Court's Findings of Fact and Conclusions of Law are reproduced in Appendix B (hereinafter "App.").

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 23, 1981. The jurisdiction of this Court is invoked under 12 U.S.C. §1254(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The pertinent regulatory provisions involved (41 C.F.R. §§1-1-605 through 1-1-607 (1980)) are set forth in App. C.

STATEMENT OF THE CASE

1. *Background.*

Petitioner, Transco Security, Inc. of Ohio (hereinafter "Transco-Ohio") was formed in September of 1978 to supply guard services exclusively to federal agencies in various locations throughout the country. As of February 1, 1980, it had ten such contracts with a number of different federal agencies.

Petitioner, Fred Gaviglia originally was employed as the manager of a commercial security service business in the Cincinnati area. That business failed financially in February of 1976 and was acquired from its owners by a Chicago-based company engaged in the provision of janitorial and related services. That company formed Transco Security Company as a division of its janitorial and other services business.

In August of 1976, the Transco Security division was incorporated in Delaware as Transco Security, Inc. (hereinafter the "Delaware corporation"). Petitioner Fred Gaviglia was a 10% owner of the Delaware corporation.

Subsequent to its incorporation in 1976, the Delaware corporation bid on several small business set-aside guard service contracts with federal agencies. In one such instance, the Delaware corporation's status as a small business was called into question by a disappointed bidder. In a contested proceeding before the Small Business Administration's Size Appeals Board, the Board found that the Delaware corporation did not qualify as a small business because its majority owner was the brother of the owner of the Chicago janitorial business. As a result of and subsequent to that determination, the Petitioner Fred Gaviglia and his wife acquired all of the outstanding shares of the Delaware corporation. This occurred in early 1977. At that time, the Delaware corporation arranged for its financial management

to be continued to be handled by a company known as Management Consultants which had been and was associated with the former owner of the Delaware corporation.

As a result of the change in ownership of the Delaware corporation, the Small Business Administration subsequently determined that the Delaware corporation was qualified as a small business and was granted certification as such on March 30, 1977. Subsequent to that certification, the Delaware corporation bid upon and received a number of security service contracts with various federal agencies, including contracts with the General Services Administration (hereinafter "GSA"), both in Cincinnati and in Cleveland, Ohio. In the summer of 1978, Petitioner Fred Gaviglia discovered that there had been substantial defalcations of funds of the Delaware corporation by Management Consultants and that substantial withholding tax payments had not been made by Management Consultants on behalf of the Delaware corporation. For these reasons, the Petitioner abandoned the Delaware corporation in September of 1978 and established the Petitioner, Transco-Ohio as a separate and distinct entity from the defunct Delaware corporation. (The then existing security service contracts as well as the extensive withholding tax liability of the Delaware corporation were assumed by Transco-Ohio.) It is undisputed that Petitioner Transco-Ohio is properly certified by the Small Business Administration as a small business.

In early 1979, Petitioners became aware of the fact that they were the subject of an investigation by GSA. Petitioners were requested by GSA to produce numerous documents, and they willingly complied with that request. During this approximate same period, Transco-Ohio was advised that its Cincinnati GSA contract would be renewed for the period September 1979 through September 1980. However, for circumstances known only to GSA, the contracts were not renewed; and they were let out for rebidding in November of

1979. Transco was the low bidder for the Cincinnati contract which was to commence February 1, 1980. Transco also was the apparent low bidder on a GSA guard service contract in Indianapolis, Indiana which was to commence several months later.

2. *Administrative And Legal Proceedings Below.*

Two days prior to the commencement of the Cincinnati contract on February 1, 1980, Petitioners received notice from GSA that they had been suspended from receiving any business from that Administration. (App. D). Approximately three weeks later, the notice was supplemented. (App. E). The Cincinnati GSA contract was not then awarded to any other bidder at that time. Rather, Transco-Ohio's guards and equipment simply were appropriated by GSA for its own use, and such appropriation continued at least through the month of February, 1980. In the meantime, Transco-Ohio continued to provide security guard services to GSA under the Cleveland contract until it expired, after several renewals, in the Fall of 1980, some eight months later.

On February 26, 1980, Petitioners filed their action in the United States District Court for the Southern District of Ohio, first to set aside the suspension, and second to enjoin GSA from precluding them from bidding on GSA contracts and to prevent the award of the Cincinnati and Indianapolis GSA contracts to any other bidders. The complaint was based upon a denial by GSA to petitioners of the due process of law to which they were entitled. In response to Petitioners' complaint, GSA submitted an affidavit which, among other things, elaborated on the suspension notices that had been previously given. (App. F).

A motion for a preliminary injunction was filed on February 26, 1980. The motion was heard by the District Court on February 28, 1980 and was denied that same day. In substance, the District Judge held that Petitioners had not been and would not be denied due process.

It must be noted that the regulations under which Petitioners' suspension was effected, provide that a hearing shall be conducted by GSA upon request. However, the regulations also provide that a hearing may be denied under certain circumstances. A hearing was requested by Petitioners under these regulations. The District Judge assumed that a hearing would be denied by GSA, (App. B, Conclusion of Law No. 5), and such hearing was in fact denied. (App. G).

Petitioners appealed the decision of the District Court on the grounds, among others, that the regulations under which GSA's suspension action was effected denied the Petitioners due process, and that the suspension notice that was given to Petitioners was defective.

On review, the United States Court of Appeals for the Sixth Circuit held that, although the suspension regulations in question had not deprived Petitioners of due process, the notices of suspension were inadequate. Accordingly, the Court of Appeals reversed and remanded the case to the District Court with appropriate instructions.

3. *Jursidiction Below.*

Jurisdiction in the District Court was predicated upon the Administrative Procedure Act, 5 U.S.C. §701, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, and the provisions of 28 U.S.C. §§1331, 1346(a)(2), 1355 and 1361. The District Judge found that jursidiction existed under 28 U.S.C. §1331. (App. B, Finding of Fact No. 1).

REASONS FOR ALLOWANCE OF THE WRIT

I. INTRODUCTION

The decision below must be reviewed because it interprets the regulations[1], which permit the suspension of government contractors for as long as 18 months, as affording due process even though a meaningful opportunity to be heard can be denied, as it was in this case. The decision below is in conflict with applicable decisions of this Court. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). The decision below also is in conflict with substantially similar decisions of the Court of Appeals for the District of Columbia Circuit in a number of analogous cases. *See e.g. Gonzalez v. Freeman*, 334 F.2d 570 (1964). In all events, "issues of far reaching importance" in those cases and in this case must be faced. For these reasons, this Court should grant review.[2]

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[1]The regulations in question, Subpart 1-1.6 of the Public Contracts, Property Management, Federal Procurement Regulations, (41 C.F.R. Subpart 1-1.6 (1980), hereinafter cited to the Code of Federal Regulations) were promulgated by the General Services Administration ("GSA") pursuant to Section 205, the Federal Property and Administrative Services Act of 1949 (40 U.S.C. §486(c)). The same or substantially similar regulations have been adopted by a number of federal agencies. *E.g.* 32 C.F.R. §1-605.1 (1976) (Department of Defense).

[2]The original twelve month suspension was extended for an additional six months. It therefore would expire on or about July 28, 1981. The issues presented by this Petition, however, are of sufficient importance that the possibility of "mootness" is not germane. The suspension action which is challenged obviously is, in its duration, too short to be fully litigated, and there is a reasonable expectation that petitioners would be subject to the same action again. *See Sosna v. Iowa*, 419 U.S. 393, 397-402 (1975). Such action could be taken by GSA on different grounds or by other federal agencies on the same grounds as presented by this case. See 41 C.F.R. §1-1.606(d). Indeed, GSA has taken steps to cause this to occur. See App. J. In addition, damages are claimed by Petitioners in this action.

II. SUSPENSION OF GOVERNMENT CONTRACTORS FOR AS LONG AS EIGHTEEN MONTHS IS SUCH A SERIOUS DEPRIVATION OF FIFTH AMENDMENT RIGHTS THAT A MEANINGFUL HEARING IS REQUIRED BY DUE PROCESS

The regulations which deal with the suspension of contractors with the federal government contain a four step procedure:

1. The "agency" makes a determination to suspend based upon "adequate evidence" of certain enumerated "causes" for suspension. 41 C.F.R. §§1-1.605(b) and 1-1.605-1(a) (1980). In the case of G.S.A., the determination is made by the "appropriate service commissioner". 41 C.F.R. §5-1.605(a) (1980).

2. Notice of the suspension must be given to the contractor. 41 C.F.R. §1-1.605-3(a) (1980).

3. The contractor is entitled to a hearing unless "the agency head or his designee shall . . . deny the request." 41 C.F.R. §1-1.605-4(b) (1980).

4. If a hearing is denied, the contractor is permitted to present whatever information or argument it wishes in opposition to the suspension to the "head of the agency or his authorized representative." 41 C.F.R. §1-1.605-4(e) (1980). That section provides:

> (e) *Hearing denied.* If it is determined, based upon the advice received from the Department of Justice or the Department of Labor, that to hold a hearing would adversely affect possible civil or criminal prosecution or possible Labor proceedings against the firm or individual, this determination will be reduced to writing and made a part of the formal record. Notice shall then be furnished to the firm or individual within 20 calendar days after receipt of the

four-step process described above, of a GSA "top level administrator." *Transco* 639 F.2d at 322. This individual also is described as a "high administrative official," *Id.* at 324, and as one who can provide "high level administrative review." *Id.* at 325.

A suspension of a contractor upon the unchallenged determination of a "high administrative official" can cause the virtual destruction of a contractor and the contractor's business; it is respectfully submitted that such a suspension without the opportunity for a meaningful hearing affords the contractor no process at all.

This Court often has held that "the fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The Court also has articulated precisely what due process requires.

> This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process.

Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring) (citations omitted).

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for

> generating the feeling, so important to a popular government, that justice has been done.

Id. at 171-72.

Justice Frankfurter's concerns are particularly applicable to the case of a suspended contractor and specifically to the contractor suspended in this case. Among others, one overriding reason for this is the "stigma and hardships" peculiarly involved.

The "stigma" attaches not only by the fact of suspension in the first instance but also by the fact that the suspension is published by GSA and distributed to every other federal agency. 41 C.F.R. §1-1.607(a) (1980). The "stigma" is even more profound when "the basis of the [suspension] action," which is stated in the published notice, is no more than a verbatim citation of the regulatory cause for suspension, *e.g.* "fraud". (See App. I). The circumstances here are not unlike those which the court found offensive in *Wisconsin vs. Constantineau*, 400 U.S. 433 (1971) when it stated at page 436:

> The only issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.

The "stigma" is not a matter of conjecture, for suspension is well recognized as "a drastic action." 41 C.F.R. §1-1.605(b) (1980). The courts of the District of Columbia have pointed out the absolutely devastating effect that suspension can have on a contractor "whose economic life may depend on his ability to bid on government contracts." *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972); *accord, Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 968 (D.C. Cir. 1980); *Art-Metal-USA, Inc. v. Solomon*, 473 F. Supp. 1, 4 (D.D.C. 1978).

In considering "the consequences of administrative termination of all right to bid or contract, colloquially called 'blacklisting' and formally called suspension or debarment," the court in *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964) quoted from a 1960 Decision of the Comptroller General in which it was stated:

> That "the penalty of black-listing is so severe that its imposition may destroy a going business," appears to be even more valid under present day conditions. As such, the power of debarment is tantamount to one of life or death over a busines * * *. Comp. Gen. Dec. B-139720 (Jan. 6, 1960).

334 F.2d at 574 n.5.

The Court went on to state:

> We need not resort to a colorful term such as "stigma" to characterize the consequences of such governmental action, for labels may blur the issues. But we strain no concept of judicial notice to acknowledge these basic facts of economic life. *Id.* at 574.

Procedural safeguards specifically are required when, as here, officials of the suspending federal agency actively initiate or participate in acts which can prevent the contractor from receiving the award of contracts from other and non-suspending federal agencies based upon the circulated notice. See App. J, pages 3-4.

In addition to the "stigma," the "hardship" also is apparent. The Petitioner, Transco, is a small business (See *e.g.*, App. H.); and its business exclusively is with federal agencies. To paraphrase a recent decision:

> [T]he Court would have to be blind to the realities to conclude that [the Petitioner] would be able to shift its long-established commercial patterns to private purchasers on essentially a 'moments notice.'

Art-Metal-USA, Inc. v. Soloman, 473 F. Supp. 1, 5 (D.D.C. 1978).

To the same effect is the opinion of the United States Court of Appeals for the Seventh Circuit in *Larry v. Lawler*, 605 F.2d 954, 958 (1978).

The length of suspension — of as much as a year and a half — coupled with effects which equal, if not exceed, the hardships of an actual criminal conviction, mandate that a meaningful due process hearing be required.

III. INITIATION OF SUSPENSION AND THE OPTION OF PASSIVE REVIEW OF SUSPENSION BY A "HIGH ADMINISTRATIVE OFFICIAL" IN LIEU OF A HEARING DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS

This Court only recently has articulated a three-part analysis to be used "to consider the extent to which due process requires an evidentary hearing prior to the deprivation of some type of property interest . . ." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).[3] The factors to be considered are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that

[3]The Court of Appeals for the Sixth Circuit properly recognized that the interest involved in *this* case was a "liberty" as opposed to a "property" interest. *Transco, supra* at 321. The Court of Appeals relied upon the analysis in the decision of the Court of Appeals for the District of Columbia Circuit in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 961-966 (1980).

the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 319 U.S. 319, 335 (1976).

The same analysis was more recently articulated in *Parham v. J.R.*, 442 U.S. 584, 599-600 (1979).

In the instant case, the Court of Appeals limited its analysis to a balancing of "government interest versus private interest" on the basis of this Court's decision in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1960). *Transco, supra* 639 F.2d at 322. Having found these two interests to be at least in parity,[4] the Court of Appeals held that the applicable regulations did not deny Petitioners due process. *Transco, supra* at 324.

The most glaring omission in the analysis by the Court of Appeals was its failure adequately to consider "the risk of an erroneous deprivation of such [private] interest though the procedures used." The procedures used, of course, do not provide for any meaningful hearing. The Court of Appeals opinion upholds a procedure whereby one never can know if there has been error; and, if there has been error, there is no method whatever to protect against it.

The Court of Appeals essentially held that the suspended contractor receives adequate due process because the decision to suspend is made by a "top level administrator," *Transco, supra* at 322, or a "high administrative official" of the suspending agency. *Id.* at 324. It is to the same faceless individual that the suspended contractor is given the *option* of presenting "evidence or argument" against the suspension decision. *Transco, supra* at 324.

The latter *option* is recognized by the Court of Appeals to be "in lieu of an adversary hearing." *Transco, supra* at 324.

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[4]It is submitted in Paragraph IV *infra*, that the government's interest was not properly examined by the Court of Appeals, and that the government's interest was demonstrably *minimal*.

Nonetheless, the Court of Appeals variously described this *option* as "an opportunity to rebut charges," as an "equivalent proceeding" to a hearing, *Transco, supra* 639 F.2d at 322, and as an "interim hearing." *Id.* at 325. Such *option* clearly is not an opportunity to confront one's accusers and to rebut charges of fraudulent conduct.

Because of the recognized, devastating impact on the interests of a federal contractor by such a prolonged suspension without a meaningful hearing, the District of Columbia courts have as much as stated that an adversary hearing is required, at least if the suspension is to exceed, for example, a month.[5]

> While we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor to confront his accusers and to rebut the "adequate evidence"], that cannot be sustained for a protracted suspension.

Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1270 (D.C. Cir. 1972).

> Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.

Gonzalez v. Freeman, 334 F.2d 570, 578 (1964).

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[5]In the recent decision of *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980), the Court cited its prior decisions on this issue with approval. However, it specifically did not decide whether or not a "formal" or "some form of hearing" would be required in the case of an actual suspension. *Id.* at 968 & n. 30.

It would seem apparent why, in the case of contractor suspension under the provisions of 41 C.F.R. Subpart 1-1.6, a meaningful hearing must be held in order to assure due process. An utterly devasting blow is dealt — solely by administrative action — to a critical "core" due process interest . . . that of liberty. The "blow" is amplified by "posting" (or "blacklisting") throughout the government with concommitant deleterious effects which reach far beyond the scope of the regulations themselves. (See App. I and J).

For these reasons, one must return to the observation of Mr. Justice Frankfurter:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171 (1951) (concurring opinion).

The critical lesson to be learned from Mr. Justice Frankfurter's statement is that neither the accuracy nor the legitimacy of due process can be achieved by handing over the process itself to the confined authority of a "top level . . . high . . . administrative official" who is thereby immune from any and all accountability.[6] This is particularly true when, as here, the official is part of the very agency whose action he is reviewing

[6]The Court of Appeals' conclusion in this regard cannot be equated with those lines of cases in which this Court has found acceptable alternatives to an adversarial hearing. *E.g. Parham v. J.R.*, 442 U.S. 584, 607 (1979) ("detached and neutral trier of fact."); *Goss v. Lopez*, 419 U.S. 565, 584 (1975) ("informal give-and-take").

and may be the same individual who took the action in the first instance.

In substance, the Court of Appeals has held that the mere existence of a "top level . . . high administrative official" within the regulatory scheme established for suspending government contractors is sufficient to assure due process. It is assumed, without question (or the opportunity to question), that this administrative official will satisfy the requirements of due process in his decision to suspend, in his notice of suspension and in his silent perlustration of the arguments of the contractor against the suspension action the high administrator himself has taken.

The fallacy of not heeding Mr. Justice Frankfurter's prescient observation that "man being what he is . . ." clearly is demonstrated by the record in this case. The particular high administrator in this case began by giving virtually no notice for the suspension in violation of the very regulations he was meant to follow. App. D. This same high administrator attempted to correct this defect by "follow-up" notices, equally deficient. App. E. The third effort by this same high administrator is even more revealing. App. F. That "notice" materially differed from and conflicted with both of the previous notices. Finally, this third effort at "notice" by the high administrator was found by the Court of Appeals to be inadequate in and of itself. *Transco, supra* 639 F.2d at 324.[7]

It is incongruous, certainly on the record in this case, to conclude that the regulatory procedure approved by the Court of Appeals, can afford due process to a suspended contractor. The opinion of the Court of Appeals simply returns control of the entire process to the same high administrative official who was incapable, on three successive occasions, of affording due process notice without judicial intervention.

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[7]It is not beyond the field of legitimate comment to speculate: (1) Whether or not the administrator who executed the notices prepared them or reviewed them in conjunction with the "adequate evidence" upon which they were meant to be based or (2) whether or not whoever did prepare the notices made such a review.

IV. SUSPENSION OF GOVERNMENT CONTRACTORS BY ADMINISTRATIVE ACTION, IF PERMITTED AT ALL, SHOULD NOT BE PERMITTED IN THE ABSENCE OF A SHOWING OF URGENT NECESSITY AND THE INADEQUACY OF ANY ALTERNATIVE MEANS OF PROTECTING THE GOVERNMENT'S INTEREST AND NO SUCH SHOWING HAS BEEN MADE IN THIS CASE.

As demonstrated above,[8] "the private interest which will be effected by the official action" of suspension,[9] coupled with the attendant "blacklisting" and related effects of the suspension, can mean the sheer destruction of a business and of ones livelihood.

Mathews v. Eldridge, 424 U.S. 319 (1976) teaches that the effected private interest must be considered in juxtaposition with "the government's interest, including the function involved . . ." *Id.* at 335. In its opinion in this case, the Court of Appeals briefly identified the following two elements of the government's interest:

> (1) "The right of the government as proprietor to purchase services, here services of a sensitive nature;" and
>
> (2) "Protecting the integrity of a possible criminal prosecution."

Transco, supra 639 F.2d at 322.

These two elements then are weighed as follows:

> "Having provided these preliminary procedural safeguards, we do not believe it is unreasonable that the government should then have a period of 12 months (or 18 months should the Assistant Attorney

[8]Pages 10-12 *supra*.

[9]*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> General request an additional six months) in which to prepare its case and decide whether to indict. During that period the *government's interest in not dealing* with a contractor which it has probable cause to suspect of wrongdoing outweighs the contractor's interest in being awarded and performing government contracts."

Transco, supra 639 F.2d at 324. (Emphasis added).

The critical inquiry which was not made by the Court of Appeals in this case (and generally is not made in any of the cases) is a meaningful inquiry into "the government's interest in *not* dealing." Stated in another fashion: "What interest of the government can be protected only by a summary suspension of the contractor?"

The interest of the government in "protecting the integrity of a possible criminal prosecution," is irrelevant to the necessity of the government to summarily suspend a contractor. The government's interest should be disregarded because it relates only to the question of whether or not a hearing will be granted and that question arises only *after* the government contractor has been suspended.

Therefore, the only government interests involved are: (1) The "proprietary" interest to purchase services; (2) the proprietary interest to purchase services of a "sensitive" nature; and (3) the proprietary interest to purchase services of a "sensitive" nature from one who is "suspected of wrongdoing." *Transco, supra.* at 324.

The existence of the government's "proprietary" interest alone is insufficient to permit suspension, as the Court of Appeals recognized. *Transco, supra* at 321. The fact that the "services" are of a sensitive nature is unimportant in the absence of some showing that "security" is or will be com-

promised in some fashion or another.[10] No such showing has been made in this case. Finally, the fact that the contractor is "suspected of wrongdoing" alone does not establish a rationale basis for the necessity of summary suspension to protect a governmental interest.[11]

It is submitted that there must exist some set of circumstances which justify the drastic action of summary suspension as the *only* means of protecting the government's particular interest in the performance of the contract in question. No such circumstances have been shown to exist in this case.[12] However, assuming that such circumstances could be shown to exist, it also must be shown that summary suspension is necessary as opposed to alternative means of protecting the government's interest.

The first step in that inquiry is to examine the actions available to the government which are alternative to summary suspension. There exists, of course, the remedy of debarment which affords a full adversarial hearing and the opportunity for judicial review based upon a record. 41 C.F.R. §1-1.604 (1980). The contract also may be terminated for its breach. Finally, of course, a criminal proceeding can be initiated. The government should be required to demonstrate that some sort of urgent conditions mandate the protection of the government's interest and permit it to take the action most destructive to the Fifth Amendment liberty interest of the contractor rather than the least destructive action available.

When a governmental action, pursuant to a statute or a regulation, infringes constitutionally protected rights, that

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[10]No claim that considerations of "national security" are involved has ever been raised in this case. *See, e.g. Horne Bros., Inc. v. Laird,* 463 F.2d 1268, 1271 (D.C. Cir. 1972) ("reasons of national security" alluded to).

[11]There does exist, after all, a presumption of innocence. *Quinn v. United States,* 349 U.S. 155, 162 (1955).

[12]It is contended that the record reveals the opposite to be the case. See pages 21-22 *infra.*

action is unlawful unless it is justified by an important, specific governmental interest, and it is the least intrusive means available to achieve its objectives. *E.g., Nixon v. Administrator of General Services,* 433 U.S. 425, 467 (1977); *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 499-500 (1977). In *Griswold v. Connecticut,* 381 U.S. 479 (1965), this Court referred, at page 485, to

> the familiar principle, so often applied by this Court, that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama,* 377 U.S. 288, 307.

The same principle was set forth by this Court in *Kusper v. Pontikes,* 414 U.S. 51 (1973).

> If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercises of fundamental personal liberties.

Id. at 59.

This principle applies equally to federal regulation. *Buckley v. Valeo,* 424 U.S. 1 (1976); *Nixon v. Administrator of General Services, supra.*

Given the perfectly acceptable alternatives available to the government, for what reason is the drastic imposition of summary suspension necessary? Presumably, suspension is considered necessary because there is inadequate time to pursue an alternative available action.[13]

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[13] Adequacy of time is the only reason alluded to by the Court of Appeals.

> [W]e do not believe it is unreasonable that the government should then have a period of 12 months (or 18 months should the Assistant Attorney General request an additional six months) in which to prepare its case and decide whether to indict.

Transco, supra, 639 F.2d at 324.

In the absence of a showing of urgent considerations, time alone does not justify summary suspension in order to protect the government's interest. Termination for breach of contract has no time constraints. That remedy is available immediately. Debarment, while not available immediately, requires but approximately 70 days from notice to decision. 41 C.F.R. §5-1.604-1 (1980). If necessity truly dictated, a criminal action also could be commenced quickly.

Obviously then, the act of suspension must bear some reasonable relationship to the necessity for immediate cessation of business with the contractor involved.[14] A showing to this end should be required. Only in such a manner can the destruction of the private interests of a government contractor be justified, if such destruction is justified at all.

The regulations permitting summary suspension disregard any consideration of necessity or any consideration of alternative means of protecting the government's interest. Furthermore, no such considerations have been shown to exist in this case; and the Court of Appeals disregarded any such considerations in upholding the suspension regulations.

Indeed, the record in this case demonstrates that no such considerations of urgency or necessity exist. Quite the opposite. The first two of the three "fraudulent representations" charged against Petitioners, "involve the status of Transco Security, Inc., a Delaware corporation, as a small business . . ." and the "fraudulent representations . . . involve . . . overcharges to the government based upon work which Transco Security, Inc., a Delaware corporation, represented was performed for the government, but which was, in fact, not performed." (App.F, p.2, ¶6). The Delaware corporation referred to had ceased active existence a year and a half prior to GSA's suspension

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[14]Such a consideration is "hinted at" in the required notice of suspension to the effect that "the irregularities . . . *seriously* reflect on the propriety of further dealings . . ." 41 C.F.R. §1-1.605-3(a)(3)(1980) (emphasis added).

CONCLUSION

This Court should review this case because of the drastic deprivation of due process rights of government contractors which are permitted by the suspension regulations as they now stand. Such deprivations of constitutionally protected rights, in light of past decisions of this Court and decisions of the District of Columbia courts and in their own right, is a matter of substantial public importance and concern. For these reasons, it respectfully is submitted that this petition for a writ of certiorari should be granted.

/s/ WILLIAM R. HARDY

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PROOF OF SERVICE

CERTIFICATE BY BAR MEMBER

I, WILLIAM R. HARDY, hereby certify:

1. That I am a member of the Bar of the United States Supreme Court; and

2. That three copies of the Peition for Writ of Certiorari were served on all parties required to be served, including the individuals listed below at the addresses listed for each individual, by depositing such copies in the United States post office, with first-class postage prepaid, on April 22, 1981:

Solicitor General
Department of Justice
Washington, D.C. 20530

Roland G. Freeman, II,
Administrator
General Services Administration
Washington, D.C. 20405

General Services Administration
Washington, D.C. 20405

Alice Daniel, Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Anthony S. Borwick
Chief Litigation Counsel
Office of General Counsel
General Services Administration
Washington, D.C. 20405

/s/ WILLIAM R. HARDY

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APPENDIX A

No. 80-3155

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TRANSCO SECURITY, INC. OF OHIO and FRED GAVIGLIA,
Plaintiffs-Appellants,

v.

ROLAND G. FREEMAN, III, Administrator, and GENERAL SERVICES ADMINISTRATION,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed January 23, 1981.

Before: ENGEL, MERRITT and KENNEDY, Circuit Judges.

KENNEDY, Circuit Judge. Transco Security, Inc. of Ohio (Transco-Ohio) and Fred Gaviglia, its president, appeal the District Court's refusal to enjoin their suspension by the General Services Administration from bidding on GSA contracts. They charge that the GSA regulations authorizing suspension of contractors suspected of fraud violate due process.

Transco-Ohio is engaged in the business of supplying guard services to various government agencies. Fred Gaviglia, its president and principal owner, was also the president of another corporation, Transco Security, Inc. of Delaware (Transco-Delaware). On September 2, 1976, Transco-Delaware was awarded a GSA contract under the small business

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A. Opinion of The United States Court of Appeals for The Sixth Circuit, *Transco Security Inc. of Ohio and Fred Gaviglia v. Roland G. Freeman, III, Administrator and General Services Administration,* Case No. 80-3155 (January 23, 1981)

B. Order and Finding of Facts and Conclusions of Law, David S. Porter, United States District Judge, Southern District of Ohio, Western Division; *Transco Security Inc. of Ohio, et al. vs. Roland G. Freeman, et al.,* Case No. C-1-80-113 (February 29, 1980)

C. Provisions of 41 C.F.R. §§1-1.605 through 1-1.607 (1980)

D. Letter of A. R. Marschall, dated January 28, 1980

E. Letter of A. R. Marschall, dated February 15, 1980

F. Affidavit of A. R. Marschall, dated February 27, 1980

G. Letter of A. R. Marschall, dated March 6, 1980

H. Pre-award Survey, Transco Security Inc. of Ohio (conducted November 9, 1979)

I. Consolidated List of Current Administrative Debarments by Executive Agencies, Office of Acquisition Policy, General Services Administration, Issue No. 65, December 1, 1980, Page 52

J. Excerpts from Statement of Howard W. Cox, Office of Special Projects, Office of the Inspector General, General Services Administration, Hearing Before the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, 97th Cong., 1st Sess.,_____(March 11, 1981) (unpublished).

set-aside provisions of the Small Business Act, 15 U.S.C. § 644, to provide security services at GSA buildings in the Cincinnati area. Several weeks later the Small Business Administration (SBA) determined that Transco-Delaware did not qualify as a small business because of the relationship of one of its owners with a Chicago-based janitorial services company.

On February 2, 1977, Mr. Gaviglia and his wife purchased all the outstanding interest in Transco-Delaware. Mr. Gaviglia then arranged for the firm to be financially managed by Management Consultants, a firm associated with the Chicago-based company. Subsequently, the SBA's Size Appeals Board determined that Transco-Delaware did qualify as a small business, and on August 1, and 15, 1978, respectively, GSA awarded Transco-Delaware guard services contracts for Cleveland and Cincinnati.

In September 1978, Transco-Delaware ceased to exist. Mr. Gaviglia thereupon formed Transco Security, Inc. of Ohio (Transco-Ohio) and took over all outstanding contracts, including the Cincinnati contract. On January 28, 1980, two days prior to the expiration of the existing Cincinnati contract and the start of the new Cincinnati contract, General Service Commissioner Marschall notified appellants by letter that his office was in receipt of evidence that Transco Security, Inc. of Ohio and Transco Security, Inc. of Delaware were engaged in the commission of fraud as an incident to obtaining and performing public contracts for the General Services Administration and that Transco-Ohio and Fred Gaviglia were temporarily suspended from doing business throughout the General Services Administration.

Appellants were advised on February 15, 1980, again by letter, that the evidence of fraud of Transco-Ohio concerned billing irregularities and misrepresentations regarding its eligibility for public contracts. Mr. Gaviglia was advised that the evidence of fraud also included billing irregularities of

Transco Security, Inc. of Delaware and that he was suspended because he was an officer of both corporations. On February 19, 1980, appellants requested a hearing regarding their suspension. On February 21, 1980, GSA awarded the Cincinnati contract to another company although Transco-Ohio was the low bidder.

On February 26, 1980, appellants filed this action to set aside the suspension and enjoin GSA from precluding them from bidding on GSA contracts and to prevent the award of the Cincinnati contract to others. They assert that the regulations of the General Services Administration relating to suspension of contractors are violative of due process, since under the circumstances of this case appellants can be prohibited from bidding and being awarded GSA contracts for up to 18 months without being afforded a hearing. Further, they charge the notices of the reasons for suspension are so deficient that they amount to no notice at all, a further denial of due process. Transco-Ohio also requested damages.

Section 1-1.605-1 of the Public Contracts, Property Management, Federal Procurement Regulations, (41 C.F.R. Sec. 1-1.605-1 (1975)) provides:

> (a) An agency may, in the interest of the Government, suspend a firm or individual:
>
> (1) Suspected, upon adequate evidence, of—
>
> (i) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract.

This regulation also permits suspension for violation of various criminal statutes and for other causes of a "serious and compelling nature." Section 1-1.605-2 provides that the suspension shall be for a temporary period pending the completion of an investigation and legal proceedings that may ensue. If no prosecution is initiated by the Department of Justice within

12 months from the date of a notice of suspension, the suspension must be terminated, unless an Assistant Attorney General requests continuance of the suspension in which case it may be continued for an additional six months. The regulations further provide for notice in general terms of the nature of the irregularities on which the suspension is based. 41 C.F.R. 1-1.605-3(a). Except in those cases in which the suspension is based on an outstanding indictment, the suspended bidder may request a hearing upon receipt of the notice of suspension. The General Services Administration is, however, required to secure formal advice of the Department of Justice concerning the impact of release of evidentiary material on possible civil or criminal action before conducting a hearing. Under certain circumstances, including those present in the instant case, a hearing may be denied The regulations provide:

> § 1-1.605-4(e) Hearing denied. If it is determined, based upon the advice received from the Department of Justice or the Department of Labor, that to hold a hearing would adversely affect possible civil or criminal prosecution or possible Labor proceedings against the firm or individual, this determination will be reduced to writing and made a part of the formal record. Notice shall then be furnished to the firm or individual within 20 calendar days after receipt of the request for a hearing that substantial interests of the Government would be prejudiced if a hearing were held but that any information or argument in opposition to the suspension may be presented in person, in writing, or through representation. Any information or argument submitted will be promptly considered by the head of the agency or his authorized representative and, if such action is deemed warranted, the suspension shall be terminated.

The determination whether to grant or deny a hearing is to be made by the agency head or his designee. 41 C.F.R. 1-1.605-4(b).

On February 27, 1980, the U. S. Attorney's office orally notified GSA that holding a hearing on appellants' suspension would adversely affect its criminal investigation. The motion for a preliminary injunction was heard February 28. During the hearing the District Judge permitted the GSA, over appellants' objections, to present certain evidence in an *in camera* proceeding from which appellant Fred Gaviglia and his attorney were excluded. The motion for preliminary injunction was denied that same day. The District Judge held that "the plaintiffs have not been denied due process thus far and there is no showing of a likelihood that they will be denied due process, i.e., that they will not [sic] be denied a hearing or, if a hearing is denied (as we expect that it will be) that plaintiffs will not be given the opportunity to present any information or argument in opposition to the suspension in person, in writing or through representation. . . ." He further concluded that plaintiffs "failed to demonstrate a substantial likelihood that they will eventually prevail on the merits." The record reflects that appellants' request to GSA for a hearing was denied by Commissioner Marschall on March 6, 1980 (after the appeal had been filed). An opportunity was extended to appellants to present to him any evidence they might wish as to why they should not be suspended.

The regulations at issue here were adopted following the decision of the D. C. Circuit in *Horne Brothers* v. *Laird*, 463 F.2d 1268 (D.C. Cir. 1972) in which Judge Leventhal held for that court that contractors could not be suspended from bidding on government contracts for extended periods of time without notice of the charges against them and an opportunity to rebut those charges. The government contends that the regulations accommodate those requirements, while appellants assert that the regulations failed to provide for meaningful notice and opportunity to be heard.

One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension

or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and, under most circumstances, a hearing. *Gonzales* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Horne Brothers, supra; Old Dominion Dairy Products, Inc.*, 631 F.2d 953 (D.C. Cir. 1980). While the deprivation of the right to bid on government contracts is not a property interest (procurement statutes are for the benefit of the government, not bidders, *Keco Industries* v. *U.S.*, 428 F.2d 1233 (Ct. Cl. 1970)), the bidder's liberty interest is affected when that denial is based on charges of fraud and dishonesty. *Old Dominion Dairy Products, Inc. supra.* The minimum requirements of due process are notice and an opportunity for hearing appropriate to the nature of the case. *Boddie* v. *Connecticut*, 401 U.S. 371 (1970).

HEARING

The regulations provide that although a request for a hearing may be made (1.1-605.4(a)) that request may be denied if a hearing would "adversely affect possible civil or criminal prosecution" (1.1-605.4(e)). Under those circumstances, in lieu of a hearing, the suspended bidder may present any information or argument in opposition to the suspension either in person, in writing, or through representation to the head of the agency or his authorized representative who is given authority if it is deemed warranted to terminate the suspension. Appellants challenge this provision on two bases: the failure to provide any hearing and the potential length of suspension (18 months should the ongoing criminal investigation continue that long).

What process is due requires a balancing between the government's interest and the private interest.

> The very nature of due process negates any concept of inflexible procedures universally applicable to every

> imaginable situation. . . . [C]onsideration of what procedures due process may require under any given circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Cafeteria Workers v. *McElroy*, 367 U.S. 886, 895 (1960).

Two government interests are invoked here. First, there is the right of the government as proprietor to purchase services, here services of a sensitive nature. Not only does the government have its usual concern that it get its money's worth, a concern present in all expenditures of taxpayers' money, but it has the further concern that guard services are essential to the daily operation of important government facilities. The second interest is in protecting the integrity of a possible criminal prosecution. On the other hand, appellants possess the liberty interest not to be denied the opportunity to bid on, and be awarded government contracts while under the cloud of a charge of fraud. The regulations attempt to accommodate these conflicting interests by requiring the decision of a top level administrator in accordance with specifically articulated standards before the suspension may be issued and permitting the suspended bidder to submit information and argument in opposition to suspension. Thus the risk of erroneous deprivation of appellants' interest is slight.

This opportunity to rebut charges distinguishes this case from *Horne Brothers*, upon which appellants rely. In *Horne Brothers*, plaintiff was suspended from bidding on government contracts because of alleged unlawful activities regarding prior government contracts. When the government refused to award Horne a naval vessel repair contract on which it was low bidder, Horne sought and was granted a preliminary injunction. Although Horne was subsequently indicted for these activities, the District Judge refused to

dissolve the injunction. On appeal the D.C. Circuit reversed, finding Horne not likely to prevail on the merits. The court went on, however, to address the procedures utilized in suspending contractors, noting that the existing suspension regulations did not require that the suspended contractor be offered an opportunity to confront his accusers and to rebut the "adequate evidence against him even though suspension might last for more than 18 months.

Appellants seize on the following language from *Horne Brothers* in support of their position.

> While we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor, that cannot be sustained for a protracted suspension.

463 F.2d at 1270.

In *Horne Brothers,* the suspended contractor was given no opportunity to rebut the adequate evidence finding. Under the present regulations, promulgated following *Horne Brothers,* suspended contractors denied a hearing are provided the opportunity to present information or argument, in person, in writing, or through representation in opposition to the suspension. Thus under the current regulations, suspended contractors will not "dangle in suspension for a period of one year or more" before being given an opportunity to rebut charges. 463 F.2d at 1271. Under most circumstances, this opportunity coupled with proper notice will timely cure such errors as suspending the wrong contractor or suspending a contractor based on mere suspicion, unfounded allegation, or error. This opportunity, however, is only meaningful if the notice is sufficiently specific to permit the suspended contractor to collect and present relevant evidence refuting the charges contained therein.

We turn then to the adequacy of the notice required by the regulations and provided here.

NOTICE

Appellants' second due process challenge is that the general notice required by the regulations and given here is deficient because it did not inform appellants of the reasons for their suspension and thus made any subsequent opportunity to be heard meaningless. Not only was the notice in general terms but the reasons originally given were later modified. Commissioner Marschall's affidavit filed in the District Court proceeding states that the grounds for suspension are:

> The fraudulent representations involve the status of Transco Security, Inc., a Delaware Corporation, as a small business and overcharges to the Government based on work which Transco Security, Inc., a Delaware Corporation, represented was performed for the Government, but which was, in fact, not performed. In addition, Transco Security of Ohio has misrepresented the caliber of performance of its employees resulting in overbillings.

The earlier notices had referred to misrepresentations regarding the eligibility of Transco-Ohio and billing irregularities by that corporation as well as the Delaware corporation. There was no reference to the quality of personnel.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1949). Or, as recently expressed, the purpose of notice is to apprise the affected individual of, and permit adequate preparation for, an impending hearing. *Memphis Light, Gas & Water Division* v. *Craft*, 346 U.S. 1 (1978).

The general notice which appellants received did not permit adequate preparation for participation in a meaningful way in any forthcoming hearing or equivalent proceeding. Ap-

pellants were suspended for, among other things, "billing irregularities." At the time this information was received, appellants had performed a number of contracts for the GSA over several years at various locations. Appellants were not told to which of these contracts the "billing irregularities" referred. Without further identifying information of at least the contract involved, and approximate date of misbillings, it would be at best onerous and at worst virtually impossible to effectively gather and present relevant information refuting this general charge.

Similarly the charge "misrepresented the caliber of employees" is also deficient. Which employees assigned to which of Transco-Ohio or Transco-Delaware's contracts does the charge refer and how was the caliber of employees misrepresented? Does it refer to the extent or quality of the employees training or to their actual performance, their diligence, tardiness, absences? It should be possible to provide at least some specifics.

The D.C. Circuit has twice addressed the notice aspect of due process in the context of suspension of a government contractor: *Horne Brothers, supra,* and *Old Dominion Dairy Products, supra.* Although there are factual distinctions between these cases and the one now before us, that court's language with respect to the notice required is instructive. In *Horne Brothers,* the court required the bidder be given "specific notice as to at least some charges alleged against him. . . ." 463 F.2d at 1271. And in *Old Dominion Dairy Products,* the court noted:

> We agree with appellant that due process in this case includes the right to be *notified* of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit.

Id. at 30.

the GSA. In this case the decision was made by GSA Commissioner Marschall. Writing for the Court in *Horne Brothers*, Judge Leventhal likened a showing of "adequate evidence" to one of probable cause.

> The "adequate evidence" showing need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at the trial, but it must be more than uncorroborated suspicion or accusation.

463 F.2d at 1271.

Once a determination of adequate evidence has been made, specific notice of the reasons for suspension have been timely provided, and the contractor, having been denied a hearing, has presented information or argument, the possibility of a lengthy suspension based on mere suspicion, unfounded allegation, and clear error no longer exists. Having provided these preliminary procedural safeguards, we do not believe it is unreasonable that the government should then have a period of 12 months (or 18 months should the Assistant Attorney General request an additional six months) in which to prepare its case and decide whether to indict. During that period the government's interest in not dealing with a contractor which it has probable cause to suspect of wrongdoing outweighs the contractor's interest in being awarded and performing government contracts.

Appellants' remaining arguments center around the February 28, 1980 hearing on the motion for preliminary injunction. Appellants allege they were prejudiced by the District Court's *ex parte in camera* inspection of GSA's evidence, and its refusal to permit a full hearing on the merits of appellants' suspension.

In view of our holding that due process is satisfied by the high level administrative review of adequate evidence, it is unnecessary for the District Court to review the evidence upon which the determination to suspend was made. Nor is it necessary for the court to grant a full hearing as to whether the suspension was proper. Judicial review should be confined to whether the proper administrative procedures were followed.

We note that generally the purpose of an *in camera* inspection by the District Court is to permit the District Judge to examine documents and determine which documents, or which portions of documents, may properly be disclosed to the other party, which should continue to be held in a confidential status, *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 788, 792 (D.C. Cir. 1971), and to separate those documents or portions of documents to be disclosed from those that must remain confidential in order to maintain the integrity of the government's legitimate interests. *In camera* evidence is ordinarily not used for the purpose of making a determination. Where the government asserts that it cannot give specific notice because to do so would seriously prejudice an ongoing criminal investigation, it may be appropriate for the court to examine the evidence *in camera* to ascertain whether the contractor has been given as specific a notice as is possible under the circumstances. If it finds that the notice given is all that can be under the circumstances, the contractor having received the process due would not be entitled to further relief. Suspension is, after all, only a temporary condition which is to last only for the period of time necessary for investigation.

IV.

Like the D.C. Circuit in *Old Dominion Dairy Products*, we are faced with the difficult task of fashioning appropriate relief nine months after the occurrence giving rise to this

litigation. At this point we are unable to tell from the record what would have happened if the District Court had granted the injunctive relief sought and required the government to provide adequate notice thereby making the opportunity to present information a meaningful one. From the record before us, we can only conjecture as to whether appellants would have been removed from the suspension list had they taken advantage of, and presented information at, this interim hearing. Although they were the low bidders there is nothing in the record to guarantee that appellants would have received the Cincinnati and Indianapolis guard service contracts had they initially received the notice to which they were entitled. However, appellants did have a right to receive adequate notice of the allegations against them so they could have a meaningful opportunity to answer those allegations. Although the Cincinnati and Indianapolis contracts are no longer in issue, appellants retain the right to that opportunity.

Given the circumstances of this case we reverse and remand to the District Court to determine whether the suspension proceedings or any other proceedings have served to cure the constitutional defect of inadequate notice and have given appellants a meaningful opportunity to present information as to why they should not have been suspended. If such cure has not yet occurred, we instruct the District Court to reconsider this case in light of this opinion and enjoin suspension unless the government cures by immediately providing proper notice. The suspension period must be computed, however, from January 28, 1980, the date of the defective notice.

APPENDIX B
ENTERED FEBRUARY 29, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRANSCO SECURITY, INC. of OHIO	:	
and	:	No. C-1-80-113
FRED GAVIGLIA,	:	
Plaintiffs,	:	*ORDER*
vs.		
ROLAND G. FREEMAN, III, Administrator	:	
	:	
and		
	:	
GENERAL SERVICES ADMINISTRATION,		
	:	
Defendents.		
	:	

This cause came on to be heard on February 28, 1980 on the application of the plaintiffs for a preliminary injunction.

Upon the complaint, motion, memoranda, exhibits, affidavits and evidence, the Court finds that the motion should be and it hereby is denied.

IT IS SO ORDERED.

/s/ DAVID S. PORTER

David S. Porter, *Judge*
United States District Court

APPROVED AS TO FORM:

/s/ WILLIAM R. HARDY

Attorney for Plaintiffs

/s/ ANTHONY W. NYKTAS

Attorney for Defendants

ENTERED FEBRUARY 29, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRANSCO SECURITY, INC.,
OF OHIO, et al. No. C-1-80-113

Plaintiffs,

v.

ROLAND G. FREEMAN, III, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PORTER, S.J.:

This cause came on for hearing on plaintiff's motion for a temporary restraining order. At the hearing on Thursday, February 28, 1980 plaintiffs presented evidence, and counsel argued their respective positions orally to the Court. The Court, after considering the facts and arguments of counsel, hereby finds and concludes that:

FINDINGS OF FACT

1. The Court has jurisdiction of this matter under 28 U.S.C. §1331.

2. On September 2, 1976, Transco Security, Inc., a Delaware corporation, entered into an agreement with the General Services Administration (hereinafter "GSA") to provide security services at several buildings managed by GSA in the vicinity of Cincinnati, Ohio (hereinafter "Cincinnati GSA

contract"). This contract was awarded under the small business set-aside provisions of the Small Business Act, 15 U.S.C. §637(a), as implemented by 41 C.F.R. §§1-1.705-7.

3. Transco Security, Inc., of Delaware ceased doing business on or about September 27, 1978 and Transco Security, Inc. of Ohio, plaintiff in this cause, assumed the Cincinnati GSA contract. During the month of November, 1979, GSA advised Transco Security, Inc. of Ohio that the Cincinnati GSA contract would have to be submitted for public bidding.

4. Transco Security, Inc. of Ohio submitted its bid on the Cincinnati GSA contract during the month of November, 1979. After the bids were opened on November 25, 1979, Transco Security, Inc. of Ohio was the low bidder on the Cincinnati GSA contract. GSA subsequently required Transco Security, Inc. of Ohio to obtain a certificate of compliance from the Small Business Administration as a condition of GSA's acceptance of its bid.

The Small Business Administration issued Transco Security, Inc. of Ohio a certificate of compliance on January 24, 1980.

5. On January 28, 1980, GSA sent a written notice to Transco Security, Inc. of Ohio and to Fred Gaviglia, its president, that Transco and Mr. Gaviglia were suspended from doing business throughout the GSA for "fraud as an incident to obtaining and performing public contracts for the General Services Administration" (*see* doc. 1, exhibits A-1 and A-2). Transco and Mr. Gaviglia received the notices on January 29, 1980. On February 15, 1980, GSA notified Transco and Mr. Gaviglia that:

> this evidence of fraud concerns billing irregularities by Transco Security of Ohio and Transco Security Incorporated, a Delaware corporation, in the performance of security guard contracts for the General Services Administration and misrepresentations by these corporations regarding their eligibility for public contracts (see doc. 1, exhibits B-1 and B-2).

6. On February 1, 1980, GSA appropriated Transco Security, Inc. of Ohio's employees to its own use to provide security services under the Cincinnati GSA contract.

7. Plaintiffs requested a hearing on February 19, 1980, 21 days after the GSA's suspension letter of January 28, 1980.

8. The Special Prosecutions Unit of the United States Attorney's Office in Chicago, Illinois, is currently investigating the allegedly fraudulent practices of Transco Security, Inc. of Delaware, Transco Security, Inc. of Ohio, and Mr. Fred Gaviglia. On February 27, 1980, the United States Attorney's Office notified GSA that holding a hearing on plaintiffs' suspension would adversely affect its criminal investigation.

9. As of the present date, the Commissioner of GSA has neither accepted nor denied plaintiff's request for a hearing. The Commissioner has until March 17, 1980 to determine whether to hold a hearing and notify plaintiffs. 41 C.F.R. §1-1.005-4(e). Since the Commissioner has received advice from the Department of Justice that to hold a hearing would adversely affect criminal investigation, the Court concludes there is no reason to believe that the Commissioner will deny plaintiffs the right to present any information or argument in opposition to the suspension in person, in writing, or through representation. *Id.*

CONCLUSIONS OF LAW

1. Because the defendants have received notice of plaintiffs' application for a temporary restraining order, the procedure followed is the same as the procedure for the issuance of a preliminary injunction. 11 C. Wright & A. Miller, Federal Practice and Procedure, §2951 (1973). The requirements for the issuance of a preliminary injunction are: (a) a substantial likelihood that the party applying for the preliminary injunction will eventually prevail on the merits; (2) the applicant

for the injunction will suffer irreparable injury unless the injunction is issued; (3) the threatened harm to the applicant outweighs the threatened harm to the opposing party; and (4) the issuance of a preliminary injunction will not disserve the public interest. *Hardin* v. *Houston Chronicle Publishing Co.*, 572 F. 2d 1006 (5th Cir. 1978); *Fox Valley Harvestore, Inc.* v. *A. O. Smith Harvestore Products, Inc.* 545 F. 2d 1096 (7th Cir. 1976).

2. The Federal Procurement Regulations provide that a government agency may temporarily suspend individuals or businesses from contracting or subcontracting with the agency when the agency has reason to suspect, upon adequate evidence, that the individual or business has engaged in fraud as an incident to obtaining, attempting to obtain, or in the performance of a public contract. 41 C.F.R. §§1-1.601-1(b); 1-1.605-1(a)(1)(i).

3. The "adequate evidence" standard which the GSA was required to meet before suspending plaintiffs is similar to the standard of "probable cause" required for an arrest of search warrant. The adequate evidence standard does not require the same showing necessary for a criminal prosecution or a formal debarment proceeding, but it requires more than a mere accusation or uncorroborated suspicion of fraudulent conduct. *Horne Brothers, Inc.* v. *Laird*, 463 F. 2d 1268, 1271 (D.C. Cir. 1972).

4. After an *in camera* inspection of the GSA's evidence of plaintiff's alleged misconduct (docs. _____ and _____) pursuant to the procedure outlined in *Horne, supra,* this Court concludes that the GSA satisfied the "adequate evidence" standard required for suspending plaintiffs from GSA contracting or subcontracting.

5. There is nothing in the applicable regulations governing suspension of bidders (41 C.F.R. §1-1.600, *et seq.*) that says a bidder may not be suspended before the prescribed procedure runs its course. In any event the Court finds and/or concludes

that plaintiffs have not been denied due process thus far and there is no showing of a likelihood that they will be denied due process, *i.e.*, that they will not be denied a hearing or, if a hearing is denied (as we expect that it will be), that plaintiffs will not be given the opportunity to present any information or argument in opposition to the suspension in person, in writing, or through representation as provided in 41 C.F.R. §1-1.605-4(e).

6. Plaintiffs have failed to demonstrate a substantial likelihood that they will eventually prevail on the merits.

Wherefore, the Court finds that plaintiffs have failed to satisfy the requirements for the issuance of the temporary restraining order prayed for, and it is hereby ordered, adjudged and decreed that plaintiffs' motion for a temporary restraining order is denied.

So ordered.

/s/ DAVID S. PORTER

United States Senior District Judge

APPENDIX C
41 C.F.R.

§1-1.605 Suspension of bidders.

(a) Agencies electing to utilize a suspension procedure shall employ the procedure set forth in this section.

(b) Suspension is a drastic action and, as such, shall not be based upon an unsupported accusation. In assessing whether adequate evidence exists for invoking a suspension, consideration should be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as to the inferences which may properly be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents, such as contracts, inspection reports, and correspondence. A suspension may be modified whenever it is determined to be in the interest of the Government to do so.

§1-1.605-1 Causes and conditions under which executive agencies may suspend contractors.

(a) An agency may, in the interest of the Government, suspend a firm or individual:

(1) Suspected, upon adequate evidence, of —

(i) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract:

(ii) Violation of the Federal anti-trust statutes arising out of the submission of bids and proposals; or

(iii) An act in violation of the Organized Crime Control Act of 1970, or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility as a Government contractor; or

(2) For other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the agency to warrant suspension. However, suspensions related to matters involving the EEO clause shall be handled in accordance with regulations which may be prescribed by the Secretary of Labor.

(b) A suspension invoked by an agency for any of the causes set forth in (a)(1) and (2) of this §1-1.605-1 may be the basis for the imposition of a concurrent suspension by another agency.

§1-1.605-2 Period and scope of suspension.

(a) *Period of suspension.* All suspensions shall be for a temporary period pending the completion of an investigation and such legal proceedings as may ensue. In the event that prosecutive action has not been initiated by the Department of Justice within 12 months from the date of the notice of suspension, the suspension shall be terminated unless an Assistant Attorney General requests continuance of the suspension. If such a request is received the suspension may be continued for an additional six months. Notice of the proposed removal of the suspension shall be given to the Department of Justice 30 days prior to the expiration of the 12-month period. In no event shall a suspension continue beyond 18 months unless prosecutive action has been initiated within that period. Whenever prosecutive action has been initiated, the suspension may continue until the legal proceedings are completed. Upon removal of a suspension, consideration may be given to debarment in accordance with §1.604 of this subpart.

(b) *Scope of suspension.* (1) Suspension may include all known affiliates of a concern (firm) or individual.

(2) A decision to include known affiliates in a proposed suspension is an individual determination and, as such, must be made on a case by case basis.

(3) The criminal, fraudulent, or seriously improper conduct of an individual may be imputed to the business firm with which he is connected when the impropriety involved was performed within the course of his official duty, or with knowledge or approval of the business firm.

§1-1.605-3 Notice of suspension.

A firm or individual that has been suspended shall be furnished immediately with a notice of the suspension, by registered mail, by the head of the agency or his designee. The notice of suspension shall state that:

(a) The suspension is based on (1) an outstanding indictment, or (2) adequate evidence that the firm or individual has committed irregularities of a serious nature in business dealings with the Government, or (3) adequate evidence of irregularities which seriously reflect on the propriety of further dealings of the firm or individual with the Government. (The notice shall identify the indictment or describe the nature of the irregularities, in general terms, without disclosing the Government's evidence);

(b) The suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(c) Bids and proposals will not be solicited from the firm or individual and, if received, will not be considered, and awards of contracts may not be made unless it is determined by the head of the agency or his authorized representative to be in the best interest of the Government;

(d) The firm or individual will not be eligible for the award of a subcontract and whenever the firm or individual is proposed as a subcontractor, the contracting officer will decline to approve subcontracting with that firm or individual in any instance in which consent is required of the Government before the subcontract is made, unless it is

determined by the agency to be in the best interest of the Government to grant approval;

(e) The suspension is effective throughout the agency; and

(f) A request for hearing will be considered unless the suspension is based upon an outstanding indictment or upon advice from either the Department of Justice or the Department of Labor that such a hearing would prejudice the substantial interests of the Government, and the hearing will be held within 20 calendar days if the request is granted.

§1-1.605-4 Hearings

(a) *Request for hearing.* A hearing may be requested upon receipt of the notice of suspension unless the basis for suspension is an outstanding indictment against the firm or individual.

(b) *Coordination with Department of Justice.* The formal advice of the Department of Justice concerning the impact of release of evidentiary material on possible civil or criminal action against a firm or individual shall be requested upon receipt of a request for a hearing, except when the basis for suspension is already known to involve possible civil or criminal prosecution against the firm or individual. If such advice is orally given, the Department of Justice shall be requested to promptly confirm the advice in writing. The agency head or his designee shall grant the request and hold a hearing or deny the request, as provided in paragraphs (d) and (e) of this §1-1.605-4.

(c) *Coordination with the Department of Labor.* [omitted]

(d) *Hearing granted.* If a decision is made to grant a hearing, the firm or individual shall be immediately informed and the hearing shall be held not later than 20 calendar days after receipt of the request. The head of the agency or his authorized representative shall promptly decide after the hearing whether to continue or terminate the suspension and

(a) Establish internal procedures and methods for giving effect to this Subpart 1-1.6.

(b) Notify the General Services Administration (GSA) of the name and address of its central office where debarment information should be sent.

(c) Furnish to GSA a copy of the notice of debarment (at time of issuance) on those debarments made under provisions of §1-1.604(a), or the Buy American Act, and provide GSA with information as to any removals of such debarments.

(d) Check the list of debarred bidders furnished by GSA, and consider firms or individuals listed thereon for inclusion upon its own list, in accordance with the provisions of this Subpart 1-1.6.

(e) As needed, request from GSA a copy of the notice on any debarment case appearing on the list herein provided to be compiled and distributed by GSA. If desired, direct inquiry concerning any debarment case may be made of the agency which originated the action.

(f) Make its list available to all contracting officers within the agency.

§1-1.607 General Services Administration responsibility.

In addition to the agency procedure provided in §1-1.606, GSA will:

(a) Compile and distribute to the designated central office address of each agency a listing of the administrative debarments and debarments under the Buy American Act made by the agencies, including the basis of action, in order that each executive agency may be informed of actions taken by each other agency. In general application, this listing will be for information purposes only and it is not intended to take the place of, or be an addition to, the lists maintained by the various agencies.

(b) Furnish to any agency, on specific request, a copy of the notice reflecting the basis for debarment action taken by another agency for causes contained in §1-1.604(a) or under the Buy American Act.

APPENDIX D

General Services Administration
Public Buildings Service, Washington, D.C. 20405

January 28, 1980

Transco Security of Ohio
9636 Cincinnati-Columbus Road
Cincinnati, OH 45241

Gentlemen:

This office is in receipt of evidence that Transco Security of Ohio has engaged in the commission of fraud as an incident to obtaining and performing public contracts for the General Services Administration.

Based on the evidence noted above and pursuant to Federal Procurement Regulation (FPR) 1-1.605-1(a)(1)(i), you are notified that Transco Security of Ohio is suspended from doing business throughout the General Services Administration.

This suspension is for a temporary period of time, pending the completion of an investigation and such legal proceedings as may ensue. Bids and proposals received from Transco Security of Ohio will not be considered, and awards may not be made unless determined by the Administrator of General Services, or his designee, to be in the best interest of the Government. Further, Transco Security of Ohio shall not be eligible for the award of a subcontract. Whenever Transco Security of Ohio is proposed as a subcontractor, the contracting officer will decline to approve subcontracting with that firm in any instance requiring consent of the Government before the subcontract is made unless it is determined to be in the best interest of the Government to grant approval.

Transco Security of Ohio may request a hearing on this matter. If that request is granted, the hearing will be held within 20 calendar days from the receipt of such request in this office.

Sincerely,

/s/ A. R. MARSCHALL

A. R. MARSCHALL
Commissioner

APPENDIX E

General Services Administration
Public Buildings Service, Washington, D.C. 20405

February 15, 1980

Transco Security of Ohio
9636 Cincinnati-Columbus Road
Cincinnati, Ohio 45241

Gentlemen:

On Jaunary 28, 1980 notification was provided that your corporation was suspended from doing business througout the General Services Administration under the provisions of Federal Procurement Regulation (FPR) 1-1.605-1(a)(1)(i). At that time it was determined that adequate evidence has been developed indicating that Transco Security of Ohio has engaged in fraud as an incident to obtaining and performing public contracts for the General Services Administration. Please be advised that this evidence of fraud concerns billing irregularities by Transco Security of Ohio in the performance of security guard contracts for the General Services Administration and misrepresentations by the corporation regarding its eligibility for public contracts.

Please be advised that the terms and conditions of the January 28, 1980 suspension remain in effect. Additionally, Transco Security of Ohio may request a hearing on this matter. If that request is granted, the hearing will be held within 20 calendar days from the receipt of such request in this office.

Sincerely,

/s/ A. R. MARSCHALL

A. R. MARSCHALL
Commissioner

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

TRANSCO SECURITY, et al.,	:	
	:	
Plaintiffs	:	
	:	
	:	Civil No.
v.	:	C-1-80-113
	:	
	:	
ROWLAND G. FREEMAN, III, et al.	:	
	:	
Defendants	:	

Affidavit of A.R. Marschall

A.R. Marschall deposed and says:

1. I am Commissioner of the Public Buildings Service, General Services Administration (GSA).

2. As Commissioner, I am responsible for suspensions and debarments.

3. By letters dated January 28, 1980, as supplemented by letters dated February 15, 1980, (Exhibits A and B) I suspended Transco Security, Inc., a Delaware Corporation; Transco Security of Ohio and Mr. Fred Gaviglia, principal owner both of Transco Security, Inc., a Delaware Corporation, and Transco Security of Ohio. Mr. Gaviglia is President of both.

4. On or about August 15, 1979, GSA awarded to Transco Security, Inc. contract number GS-05B-41886 for guard service

in Cincinnati, Ohio. On or about August 1, 1978, GSA awarded Transco Security, Inc. contract number GS-05B-27502 for guard service in Cleveland, Ohio. On or about August 15, 1978, GSA awarded to Transco Security, Inc. contract number GS-05B-41886 for guard service in Cincinnati, Ohio. Each contract was awarded under a small business set aside.

5. On or about January 28, 1980, the Office of Inspector General, General Services Administration, presented evidence to me that Transco Security, Inc. and its President, Mr. Fred Gaviglia, had made fraudulent representations to GSA in connection with the award and performance of the three contracts mentioned in paragraph 4.

6. The fraudulent representations involve the status of Transco Security, Inc., a Delaware Corporation, as a small business and overcharges to the Government based on work which Transco Security, Inc., a Delaware Corporation, represented was performed for the Government, but which was, in fact, not performed. In addition, Transco Security of Ohio has misrepresented the caliber of performance of its employees resulting in overbillings.

7. The evidence presented to me was referred to the Justice Department's Criminal Division by the Office of Inspector General on December 11, 1979, for any action which the Justice Department considers appropriate.

8. The suspendees, pursuant to 41 C.F.R. §1-1.605-4(a) have the right to request a hearing.

Upon receipt of such request, GSA under 41 C.F.R. §1-1.605(4)(d)-4(e) consults with the Justice Department as to whether a hearing would adversely affect an ongoing civil or criminal investigation; upon receipt of advice from the Justice Department, I determine whether holding a hearing would prejudice substantial interests of the Government.

9. On February 26, 1980, GSA received the suspendees' written request of February 19, 1980, for a hearing. GSA has

orally consulted the Justice Department for advice on whether holding a hearing would harm a pending civil or criminal investigation, as set forth in the applicable regulations. It is my understanding that Mr. Thomas Johnson, Chief, Special Prosecutions Branch, United States Attorneys Office, Northern District of Illinois, has orally advised a representative of the Office of Inspector General that holding a hearing would adversely affect an ongoing criminal investigation.

Upon confirmation in writing, I will make a determination as to whether a hearing should proceed.

10. Should I deny suspendees a hearing, I will consider any information or argument in opposition to the suspension the suspendees wish to present, either in writing, in person or through representation, pursuant to 41 C.F.R. §1-1.605-4(e).

/s/ A. R. MARSCHALL

A. R. Marschall
Commissioner
Public Buildings Service
General Services Administration

Subscribed and sworn to before me this 27th day of February, 1980, at Washington, D.C.

/s/ ANNA M. PENINGER

NOTARY PUBLIC

My commission expires February 14, 1983.

APPENDIX G

General Services Administration
Public Buildings Service, Washington, D.C. 20405

March 6, 1980

REGISTERED MAIL — RETURN RECEIPT REQUESTED

Transco Security of Ohio
9636 Cincinnati-Columbus Road
Cincinnati, OH 45241

Gentlemen:

Based upon advice which has been received from the Justice Department, I determine that substantial interests of the Government would be prejudiced if a hearing were held. Consequently, pursuant to 41 CFR Sec. 1.605-4(e), your request for a hearing dated February 19, 1980, received by this office on February 27, 1980, is denied.

However, pursuant to 41 CFR Sec. 1-1.605-4(e), I will consider any information or argument you wish to present either orally or in writing, in person or through representation in opposition to the suspension.

Pursuant to 41 CFR Sec. 1-1.605-4(e), any information or argument you submit to me will be promptly considered in determining whether a continuation of the suspension is warranted.

Very truly yours,

/s/ A. R. MARSCHALL

A. R. MARSCHALL
Commissioner

cc:
Mr. William R. Hardy
Graydon, Head & Ritchey
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202

APPENDIX H

PRE-AWARD SURVEY
TRANSCO SECURITY INC. OF OHIO

PRODUCTION NARRATIVE

Solicitation: F32605-79-B-0036 Serial: S3604A9N001P

A Pre-Award Survey was conducted on 9 November 1979 at Transco Security Inc. of Ohio (TRANSCO), 9636 Cincinnati-Columbus Road (Rt. 42), Cincinnati, Ohio 45241. Mr. Fred Gaviglia, owner and operator of the company provided the information for the survey.

TRANSCO was incorporated in 1976 and is considered a small business.

The objective of this survey was to determine if TRANSCO can be expected to furnish satisfactory guard service for the Missile Early Warning System located at Concrete, North Dakota, in compliance with the scope of the bid package and scheules I, II, and III.

The following sections include the factors investigated, our rating of each factor and the rationale for that rating.

Labor Resources — Satisfactory — A review was made of the manpower requirements as specified in the guard functions and it was determined that 24 guards, including supervision and training, could satisfy the security requirements. Seven part-time guards can adequately furnish all the back-up guard service necessary. The existing guard force maintained by National Investigation Bureau Inc. consists of 24 full-time guards. Of the 24 individuals involved, one is assigned as chief and five as supervisors. In addition, there are seven part-time guards that are used as back-up personnel. This service meets the scope of the bid package. TRANSCO, if awarded this contract plans to hire the guards presently employed by National Investigation Bureau Inc. and working at the site.

APPENDIX I

CONSOLIDATED LIST OF CURRENT ADMINISTRATIVE DEBARMENT BY EXECUTIVE AGENCIES

Office of Acquisition Policy,
General Services Administration
Issue No. 65, December 1, 1980, Page 52

Contractor, Firm or Individual	Termination Date	Originating Agency	Basis of Action
Transco Security, Inc. Transco Security of Ohio 9636 Cincinnati-Columbus Rd. Cincinnati, Ohio Gaviglia, Fred	SUSPENSION	GSA	Commission of fraud as an incident to obtaining and performing public contracts

APPENDIX J
EXCERPTS FROM

STATEMENT OF
HOWARD W. COX
OFFICE OF SPECIAL PROJECTS
OFFICE OF THE INSPECTOR GENERAL
GENERAL SERVICES ADMINISTRATION

BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT

MARCH 11, 1981

Mr. Chairman and Members of the Committee:

On behalf of the Office of Inspector General, I would like to thank you for this opportunity to address the Committee on the matter of our investigations into improper contracting practices within the General Services Administration. It is my belief that major efforts are needed to insure that the government and federal contracting appropriations are adequately protected from improper business practices.

The Office of Inspector General has been conducting a broad examination into the business integrity of companies who are performing contracts for the agency. GSA is required by statute, 41 U.S.C. §253(b) and regulation, 41 C.F.R. §1-1.12 to award contracts only to responsible bidders. However, little if any regulatory or policy guidance has been developed by GSA which would assist contracting officials in defining the concept of contractor responsibility. Furthermore, no central source of contractor performance

Mr. Gaviglia reported that he contacted Mrs. Bev Sandale, supervisor of the present guard service at the MEWS site to determine if the present employees would be willing to work for TRANSCO should the contract be awarded. All guards agreed to become employees of TRANSCO. A telephone call was made to Mrs. Sandale and she verified the information reported by Mr. Gaviglia.

Performance Record — Satisfactory — Phone conversations with knowledgeable personnel regarding performance on current contracts produced the following information.

Naval Finance Station Cleveland, Ohio	Mr. Deyso 8-352-0932	Satisfactory
EPA Cincinnati, Ohio	Carl Eastwood 513-684-7262	Satisfactory
Ft. McNair Washington, D.C.	Stan Clark 8-274-7993	Satisfactory
Ft. Belvoir, VA	Albert Rickert 8-703-664-5016	Satisfactory
Federal Building Cleveland, Ohio	Mr. Deyso 8-352-0932	Generally satisfactory. Some tardiness, some sloppy uniforms.
Federal Building Cincinnati, Ohio	Lt. Patterson 513-684-2368	Guard duty probably the best in the area.
Ft. Huachuca, Arizona	John Kelley 8-761-2151 538-2775	Doing a good job.

It should be noted that from 1 April 1977 to 1 October 1978, a period of eighteen months, TRANSCO performed the same guard service that has been requested by this IFB on contract DASG60-77-C-0063. The procuring activity was the Ballistic Missile Defense System Command, Huntsville, Alabama. The

information is available which would enable contracting officials to make reasonably informed responsibility determinations.

A primary goal of the Office of Inspector General is to develop information concerning contractor integrity and to disseminate this information to appropriate agency officials for their use in making responsibility determinations. During the course of many investigations, adverse information is developed which clearly indicates a lack of business integrity on the part of various government contractors. This information can often be utilized to support both a criminal charge against the contractor and an administrative determination of non-responsibility, which would enable the government to deny the award of any contracts to the contractor.

* * * *

Since April 1979, one of the primary areas of Office of Inspector General activity has been our examination of the award and performance of building services contracts.

* * *

One of our earliest investigations in this area dealt with a guard contractor named Transco Security Inc., a Delaware corporation.

* * * *

In December 1979 the Inspector General determined under Sec. 4(d) of the Inspector General Act of 1978 that adequate evidence of criminal conduct [on the part of Transco] had been developed to warrant referral of the matter to the Department of Justice.

* * * *

It was concluded [by GSA] that since adequate evidence of criminal fraud was in the possession of the agency, appropriate steps should be taken to protect the agency from engaging in further contractual relations with the subjects of a criminal investigation.

* * * *

The Commissioner ruled on January 28, 1980 that adequate evidence of fraud had been presented and prepared a set of findings and determinations to support his conclusion that Transco should be suspended for one year. Transco of Ohio, Transco of Delaware and their officers were informed of the suspension by mail and their names were placed on the GSA consolidated list of debarred and suspended bidders. This list was disseminated throughout GSA and other federal contracting activities in April 1980.

* * * *

Transco of Ohio sought injunctive relief in U.S. District Court. The court reviewed the evidence considered by the Commissioner and concluded that adequate evidence of fraud had been presented and upheld the suspension. The court's decision was announced on February 28, 1980.

* * * *

In July 1980 I was reviewing a series of Comptroller General procurement decisions. One decision indicated that Transco of Ohio was being considered for the award of an Environmental Protection Agency (EPA) guard contract in Cincinnati, Ohio. I contacted the Office of Inspector General at EPA and indicated that Transco of Ohio had been suspended for fraud by GSA. We discussed that while GSA's determination was not binding on EPA, such a determination was clearly an element of non-responsibility which would warrant the contracting officer's referral of the matter to the SBA for a COC.

* * * *

Despite the notice to DCAS [Defense Contract Administrator Service] that Transco was suspended by GSA for fraud, no inquiry was ever directed to GSA by that agency concerning the suspension. On three separate occasions I contacted DOD contracting officers at Grand Forks Air Force Base, ND, Fort Huachuca, AZ, and Fort Belvoir, VA, and informed the contracting officials that Transco, their

incumbent contractor, was under investigation by GSA for fraud.

* * * *

In September 1980 a contracting officer with the Department of the Navy contacted me concerning Transco's suspension. In response to his request for information, I transmitted copies of GSA's suspension letters regarding Transco and its officers. As a result of this information, in November 1980 the Department of the Navy in Philadelphia, PA, ruled Transco to be non-responsible on a contract and referred the matter to the SBA in Chicago for a COC.

In December 1980 a contracting officer at the Department of Agriculture in Peoria, Il., contacted me concerning the suspension of Transco. I again provided copies of the suspension notices to the contracting officer, who in turn ruled Transco to be non-responsible and referred the matter to the SBA for a COC.

* * * *

A system must be developed whereby the suspension of a contractor by one agency will be fully and quickly considered by the other agencies in any subsequent procurements. In my opinion, the best way to effectuate this policy would be to have any agency's suspension/debarment given immediate government wide effect.

Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1778

In the Supreme Court of the United States

OCTOBER TERM, 1980

TRANSCO SECURITY, INC. OF OHIO
and FRED GAVIGLIA, PETITIONERS

v.

ROLAND G. FREEMAN, III, ADMINISTRATOR
and GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
JOHN C. HOYLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in remanding this case to the district court to require that a government contractor be given adequate notice of the reasons for his suspension from bidding on, or being awarded, government contracts, the court of appeals correctly ruled that the federal regulations under which the General Services Administration temporarily suspended the contractor pending the outcome of an ongoing criminal investigation comply with the requirements of due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1778

TRANSCO SECURITY, INC. OF OHIO
and FRED GAVIGLIA, PETITIONERS

v.

ROLAND G. FREEMAN, III, ADMINISTRATOR
and GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 639 F.2d 318. The opinion of the district court (Pet. App. B-1 to B-6) is unreported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on January 23, 1981. The peti-

tion for a writ of certiorari was filed on April 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal Procurement Regulations (41 C.F.R. 1-1.600 *et seq.*) provide for the suspension of a government contractor from bidding on, or being awarded, contracts by a federal agency pending the completion of an investigation of alleged wrongdoing and any legal proceeding that may ensue. Section 1-1.605-1 provides:

> (a) An agency may, in the interest of the Government, suspend a firm or individual:
>
> (1) Suspected, upon adequate evidence,[1] of—
>
> (i) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract * * *.

"Suspension" is defined by the regulations as "a disqualification from Government contracting and sub-

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[1] The standard for weighing the sufficiency of the evidence needed to support a suspension is described as follows (41 C.F.R. 1-1.605(b)):

> Suspension is a drastic action and, as such, shall not be based upon an unsupported accusation. In assessing whether adequate evidence exists for invoking a suspension, consideration should be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as to the inferences which may properly be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents, such as contracts, inspection reports, and correspondence. * * *

contracting for a temporary period of time because a concern or individual is suspected upon adequate evidence (see § 1-1.605) of engaging in criminal, fraudulent or seriously improper conduct." 41 C.F.R. 1-1.601-1(b).

The firm or individual suspended must be furnished immediately with a notice of suspension by registered mail (41 C.F.R. 1-1.605-3). The notice of suspension must state that the suspension is based on one of the following grounds (*id.* at 1-1.605-3(a)):

> (1) an outstanding indictment, or (2) adequate evidence that the firm or individual has committed irregularities of a serious nature in business dealings with the Government, or (3) adequate evidence of irregularities which seriously reflect on the propriety of further dealings of the firm or individual with the Government. (The notice shall identify the indictment or describe the nature of the irregularities, in general terms, without disclosing the Government's evidence) * * *.

Except in those cases in which the suspension is based on an outstanding indictment, the suspended bidder may request a hearing (41 C.F.R. 1-1.605-4(a)), which is to be held within 20 days if the request is granted (*id* at 1-1.605-3(f)). Upon receipt of a request for a hearing, the agency requests the formal advice of the Department of Justice "concerning the impact of release of evidentiary material on possible civil or criminal action against [the] firm or individual (*id.* at 1-1.605-4(b)). If it is determined by the head of the agency or his designee that "to hold a hearing would adversely affect possible civil or criminal prosecution" (*id.* at 1-1.605-4(e)), a hearing may be denied. But "information or argument

in opposition to the suspension may be presented in person, in writing, or through representation [and] * * * if such action is deemed warranted, the suspension shall be terminated" (*ibid.*).

The regulations also prescribe the maximum period of a suspension (41 C.F.R. 1-1.605-2(a)). The suspension must be terminated within 12 months from the date of the notice of suspension, unless prosecutive action has been initiated by the Department of Justice or an Assistant Attorney General requests continuance of the suspension (*ibid.*). If an Assistant Attorney General makes such a request, the suspension may be continued for an additional six months, but "[i]n no event shall a suspension continue beyond 18 months unless prosecutive action has been initiated within that period" (*ibid.*).

2. Petitioners Transco Security, Inc. of Ohio (hereinafter "Transco-Ohio") and Fred Gaviglia, Transco-Ohio's president and principal owner, are in the business of providing security services to Federal government agencies (Pet. App. A-1). They were suspended from bidding on government contracts pursuant to the federal regulations described above. The following events led to the suspension. Initially, petitioner Gaviglia was president of another corporation, Transco Security, Inc. of Delaware (hereinafter "Transco-Delaware"). On September 2, 1976, Transco-Delaware was awarded a GSA contract under the small business set-aside provisions of the Small Business Act, 15 U.S.C. 644, to provide security services at GSA buildings in the Cincinnati, Ohio area (Pet. App. A-1 to A-2). Several weeks later, the Small Business Administration (hereinafter "SBA") determined that Transco-Delaware did not qualify as a small business because of the relation-

ship of one of its owners to a Chicago-based janitorial services company (*id.* at A-2). Thereafter, petitioner Gaviglia and his wife ostensibly purchased all of the outstanding interest in Transco-Delaware and arranged for the firm to be managed by a firm associated with the Chicago-based janitorial services company (*ibid.*). Subsequently, SBA's Size Appeals Board ruled that Transco-Delaware qualified as a small business (*ibid.*). In August 1978, GSA awarded Transco-Delaware guard services contracts for Cleveland and Cincinnati (*ibid.*).

In September 1978, Transco-Delaware ceased to exist, and petitioner Gaviglia founded Transco-Ohio, which took over all outstanding contracts of Transco-Delaware, including the Cincinnati contract (Pet. App. A-2). On January 28, 1980, two days before the expiration of the existing Cincinnati contract and the effective date of a new Cincinnati contract, GSA, through its Commissioner of Public Buildings Service, A.R. Marschall, notified petitioners by separate letters that the Commission's office was "in receipt of evidence that Transco Security, Incorporated, a Delaware corporation, and Transco Security of Ohio have engaged in the commission of fraud as an incident to obtaining and performing public contracts for the General Services Administration" (J.App. 43, 45, 47).[2] Based on that evidence, the letters stated, Transco-Delaware, Transco-Ohio, and petitioner Gaviglia were being "suspended from doing business throughout the General Services Administration" for a "temporary period of time, pending the completion of an investigation and such legal proceedings as may ensue" (*ibid.*). They were advised that they could

[2] "J.App." refers to the Joint Appendix filed in the court of appeals.

> release of such information to Transco Security. If the court deems it appropriate, we have no objection to the court's *in camera* review of such material.

Accordingly, on March 6, 1980, Commissioner Marschall notified petitioners that he was denying their request for a hearing, stating (J.App. 222, 223) that "[b]ased upon the advice which has been received from the Justice Department, I determine that substantial interests of the Government would be prejudiced if a hearing were held." The notice also informed petitioners that Commissioner Marschall would, pursuant to 41 C.F.R. 1-1.605-4(e), "consider any information or argument you wish to present either orally or in writing, in person or through representation in opposition to the suspension" and that any information or argument presented to him would be promptly considered in determining whether a continuation of the suspension was warranted (J. App. 222, 223). Petitioners presented no information or argument to Commissioner Marschall.

Shortly after the suspension was imposed, GSA awarded the contract for guard services in Cincinnati to another company (Pet. App. A-3). Although Transco-Ohio submitted the low bid for that contract, it was ineligible for consideration as a result of the suspension. Performance of the contract began on March 1, 1980.

3. On February 26, 1980, petitioners filed this action in the United States District Court for the Southern District of Ohio, seeking, *inter alia*, to set aside the suspension and enjoin GSA from precluding them from bidding on contracts (Pet. App. A-3; J. App. 3-10). Petitioners filed a motion for a temporary restraining order on the same day (J.A. 17). The district court treated the motion as a mo-

tion for a preliminary injunction and held a hearing two days later. In addition to the evidence presented in open court at that hearing, the government presented certain evidence *in camera* to the district court in order to prevent disclosure of information that would interfere with its ongoing criminal investigation. On February 29, 1980, the district court denied the motion for a preliminary injunction because petitioners "failed to demonstrate a substantial likelihood that they will eventually prevail on the merits" (J.App. 167). The court—ruling before GSA Commissioner Marschall's March 6, 1980, denial of petitioners' request for a hearing—stated (Pet. App. B-5 to B-6):

> [T]he Court finds and/or concludes that plaintiffs have not been denied due process thus far and there is no showing of a likelihood that they will be denied due process, *i.e.*, that they will not [*sic*] be denied a hearing or, if a hearing is denied (as we expect it will be), that plaintiffs will not be given the opportunity to present any information or argument in opposition to the suspension in person, in writing, or through representation as provided in 41 C.F.R. § 1-1.605-4(e).

Petitioners appealed from this denial of a preliminary injunction. The court of appeals reversed and remanded, holding that "[t]he general notice which [petitioners] received did not permit adequate preparation for participation in a meaningful way in any forthcoming hearing or equivalent proceeding" (Pet. App. A-9). The court, however, rejected petitioners' challenges to the other aspects of the suspension procedures used by GSA pursuant to federal regulations, stating (Pet. App. A-12):

> Once a determination of adequate evidence has been made, specific notice of the reasons for

suspension have been timely provided, and the contractor, having been denied a hearing, has presented information or argument, the possibility of a lengthy suspension based on mere suspicion, unfounded allegation, and clear error no longer exists. Having provided these preliminary procedural safeguards, we do not believe it is unreasonable that the government should then have a period of 12 months (or 18 months should the Assistant Attorney General request an additional six months) in which to prepare its case and decide whether to indict. During that period the government's interest in not dealing with a contractor which it has probable cause to suspect of wrongdoing outweighs the contractor's interest in being awarded and performing government contracts.

ARGUMENT

The issue presented for resolution by this Court has been rendered moot and is therefore not justiciable. In any event, even were this case found to come within an exception to the mootness doctrine, review by this Court would not be warranted because the decision of the court of appeals is correct and does not conflict with any decision of this Court or of other courts of appeals.

1. The order reviewed by the court of appeals was the district court's order denying petitioners' request for preliminary injunctive relief. Petitioners had sought a preliminary order either enjoining GSA from awarding the contracts in question until a final determination was made "in accordance with due process of law, of Transco's entitlement to provide [the contract] services[,]" or, alternatively, requiring GSA actually to award Transco the contracts until such a procedurally adequate determination had been made (J.App. 9). Petitioners contended,

as they do here, that they are entitled to an adversary hearing on the fraud charges that gave rise to the suspension and that procedures permitting their suspension on the basis of suspicion of fraud supported by what the agency finds to be adequate evidence, without the grant of such a hearing, are constitutionally infirm.

That due process question is now moot. On July 14, 1981, petitioner Gaviglia was indicted by a federal grand jury on charges of devising "a scheme and artifice to defraud the United States General Services Administration and the United States Small Business Administration."[3] Those charges can now be resolved through the adversary hearing procedures of a criminal trial. Moreover, the existence of this indictment provides an independent basis for the suspension (see 41 C.F.R. 1-1.605-3(a)(1)), and the procedures petitioners seek to challenge are inapplicable to persons subject to indictment (41 C.F.R. 1-1.605-4(a)). Petitioners' remaining damage claim for the alleged "appropriation and use by G.S.A. of Transco's employees to provide the security services previously supplied by Transco" (J.App. 10), based on its separate "Third Cause of Action" (J.App. 9), is not related to the due process issues raised in the petition. Thus, like *University of Texas* v. *Camenisch*, No. 80-317 (Apr. 29, 1981), slip op. 3, "[t]his * * * is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot." Furthermore, as in *Camenisch*, the existence of justiciable issues pending in the court below does not make the issue presented for review in this Court justiciable.

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[3] Indictment at 2. A copy of that indictment is being lodged with the Clerk of this Court.

Petitioners also appear to recognize that the due process issue would be mooted on July 28, 1981, by the expiration of the maximum 18-month period during which a suspension may continue in the absence of a criminal indictment (see 41 C.F.R. 1-1.605-2(a)). They nonetheless argue (Pet. 6 n.2; citation omitted) that the issue should not be considered moot because the challenged suspension action was "in its duration, too short to be fully litigated, and there is a reasonable expectation that petitioners would be subject to the same action again." Even assuming that petitioners are correct in suggesting that an 18-month period is too brief ever to allow full litigation of the due process issue, however, their argument is unavailing because of the intervening indictment. That indictment eliminates any realistic possibility that petitioners will be subject to "the same action" again. As explained above, the challenged agency procedures are totally inapplicable to any future suspensions based on an indictment. Moreover, the due process issue is not one that inherently evades review. If it were raised in a complaint seeking injunctive relief for a class of similarly situated contractors, *e.g.*, relief in the form of an order enjoining the agency from maintaining the challenged regulations, the issue would not become moot by virtue of the expiration of the named plaintiff's maximum suspension period. *Sosna* v. *Iowa*, 419 U.S. 393 (1975).[4]

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[4] Although the issue presented in the petition is moot, there is no reason for this Court to vacate the judgment of the court of appeals. As we show below, petitioners' claim would not merit review even in the absence of a suggestion of mootness. This case is thus unlike those that become moot after a grant of certiorari, thereby depriving this Court of jurisdic-

2. Contrary to petitioner's contentions (Pet. 9-20), the decision of the court of appeals is fully consistent with established law. The regulations prescribing the procedures used in this case were adopted following *Horne Bros., Inc.* v. *Laird*, 463 F.2d 1268 (D.C. Cir. 1972), and were intended to comply with the due process requirements specified in that case. See 39 Fed. Reg. 13777 (1974). Petitioners complain that they were denied a due process right because those procedures did not accord them a trial-type hearing on the fraud allegations. But due process "does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 894 (1961). Indeed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id.* at 895. Instead, the procedural protections required by due process are those that "the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 12-13 (1979).

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tion to decide a legal issue that is worthy of review. See, *e.g.*, *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). Similarly, the rule applicable to cases that become moot while on appeal is inapposite here, since in such instances the appellant has been deprived of his statutory right to an appellate resolution of the controversy. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). By contrast, "review on writ of certiorari is not a matter of right * * *." Sup. Ct. R. 17.1. If the Court would have denied the petition in any event, a litigant who seeks certiorari on an issue that becomes moot while his petition is pending is deprived of nothing to which he would otherwise have been entitled when the Court denies the petition and leaves the judgment below undisturbed.

Following this Court's guidance in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), the court of appeals carefully considered (Pet. App. A-6 to A-7) three factors: the private interests of the party seeking additional procedural protections, the government's interest in utilizing the current procedures, and "the risk of [an] erroneous deprivation" of the private party's interest if additional protections are not provided.

First, the court balanced the government's interests in not dealing with a contractor reasonably suspected to be a wrongdoer and in protecting the integrity of a potential criminal prosecution against the contractor's interest in receiving government contracts during the pendency of a criminal investigation of his conduct. The court properly concluded (Pet. App. A-7 to A-8) that, when adequate notice of the charges is given, the balance struck by the regulations is appropriate and constitutionally permissible. The governmental interests protected by this procedure are important. Holding a full trial-type hearing on fraud charges during a criminal investigation of those charges, and thereby divulging evidence pertinent to the investigation, could greatly hamper the government's ability to proceed with an effective criminal prosecution. Furthermore, deferring suspension of security organizations operated by persons who reasonably are suspected of defrauding the government would unduly interfere with the responsibilities of GSA under 40 U.S.C. 318 to protect federal property within its jurisdiction. The contractor's interest in avoiding suspension and harm to his reputation is displaced only to the extent necessary to protect those weighty governmental interests. The suspension is temporary, and the request for a trial-type hearing is denied only when

an appropriate official of the Department of Justice advises the GSA that a hearing "would adversely affect possible civil or criminal prosecution." 41 C.F.R. 1-1.605-4(e).

Most importantly, the court of appeals correctly concluded (Pet. App. A-7) that, under this procedure, "the risk of erroneous deprivation of [petitioners'] interest is slight." A suspended party is not deprived of an opportunity to argue against the suspension, for even when a trial-type hearing is denied, the party is afforded a full opportunity to present any information or arguments in opposition to the suspension in person, in writing, or through a legal representative (41 C.F.R. 1-1.605-4(e)). Moreover, under the court of appeals' decision, a party in cases such as this is entitled to a notice of charges sufficiently specific to make the opportunity to argue against the suspension a meaningful one (Pet. App. A-11 to A-12).[5]

In sum, the court of appeals properly balanced the public and private interests involved in this case. Contrary to petitioners' assertion (Pet. 6), the decision below does not conflict with *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), or *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123 (1951). In both of those cases, the government actions were taken without any notice or opportunity for the injured party to respond to the charges against it.[6]

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[5] GSA provided more specific notice of the charges to petitioners on Feb. 2, 1981. See App. B, *infra*. The proceedings in the district court have been held in abeyance pending the disposition of this petition, so the court has not ruled on the constitutional adequacy of the new notice.

[6] The decision below similarly does not, as petitioners assert (Pet. 6), conflict with any decisions of the District of Colum-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
JOHN C. HOYLE
Attorneys

JULY 1981

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bia Circuit. *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964), on which petitioners principally rely (Pet. 6, 11, 14), involved a contract debarment by an agency which had no published procedures for taking such action. The court held (334 F.2d at 580) that the relevant statutes did not authorize "debarment without either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment of [the debarred party]." It declined to reach the constitutional issue presented (*ibid.*). Far from creating a conflict with the District of Columbia Circuit, the court below specifically relied (see, *e.g.*, Pet. App. A-7, A-8, A-10, A-11) on two decisions of that circuit—*Horne Bros., Inc.* v. *Laird*, *supra*, and *Old Dominion Dairy Products, Inc.* v. *Secretary of Defense*, 631 F.2d 953 (1980)—both of which were decided after *Gonzalez*.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-3155

TRANSCO SECURITY, INC. OF OHIO and FRED GAVIGLIA, PLAINTIFFS-APPELLANTS

v.

ROLAND G. FREEMAN, III, Administrator, and GENERAL SERVICES ADMINISTRATION, DEFENDANTS-APPELLEES

Filed Jan. 23, 1981

Before: ENGEL, MERRITT and KENNEDY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal,

as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER
OF THE COURT.

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

A True Copy.

Attest:

/s/ [Illegible]
[ILLEGIBLE]
Deputy Clerk

Issued as Mandate:

March 3, 1981

COSTS: None

Filing fee .....$
Printing .....$

Total $

APPENDIX B

GSA
GENERAL SERVICES ADMINISTRATION
PUBLIC BUILDINGS SERVICE
Washington, DC 20405

Feb. 2, 1981

REGISTERED MAIL—
RETURN RECEIPT REQUESTED

Transco Security of Ohio
9636 Cincinnati—Columbus Road
Cincinnati, OH 45241

Gentlemen:

As I indicated to you in my letters of January 28 and February 15, 1980, this office is in receipt of evidence that Transco Security of Ohio, Transco Security, Inc. of Delaware, and Fred Gaviglia have engaged in the commission of fraud as an incident to obtaining, attempting to obtain, and performing public contracts for the General Services Administration (GSA). In accordance with the January 23, 1981, directives of the U.S. Court of Appeals in their decision in *Transco Security, Inc. et al.* v. *Freeman, et al.*, this letter will serve as specific notice to you regarding the existence of adequate evidence of fraud, which led to the January 28, 1980, suspensions under the provisions of 1-1.605-1(a)(1)(i) of the Federal Procurement Regulations (FPR).

1. *Misrepresentations by the corporation regarding its eligibility for public contracts.* In 1976 and 1977, the eligibility of Transco Security, Inc. of Delaware, for small business set-aside contracts was challenged

before the Small Business Administration (SBA) Regional Office in Chicago, Illinois and before the SBA Size Appeals Board in Washington, D.C. Adequate evidence has been presented which indicates that Fred Gaviglia and Transco Security, Inc. of Delaware, repeatedly misrepresented their size to the SBA in the course of the size determination proceedings. Specifically, Fred Gaviglia and Transco Security, Inc. of Delaware, misrepresented the absence of an affiliation with Transcontinental Cleaning Co. Inc. The existence of this affiliation made Transco Security, Inc. of Delaware, a large business, and, therefore, the corporation was ineligible for the award of any small business set-aside contracts. Fred Gaviglia and Transco Security, Inc. of Delaware, then misrepresented their size to GSA in their solicitations for the award of contracts, and as a result of these misrepresentations, were awarded three small business set-aside contracts:

a. GS-05B-41886 for guard service in Cincinnati, OH, dated August 15, 1977.

b. GS-05B-27502 for guard service in Cleveland, OH, dated August 1, 1978.

c. GS-05B-41886 for guard service in Cincinnati, OH, dated August 15, 1978.

2. *Billing irregularities by Transco Security of Ohio and Transco Security, Inc. of Delaware.* As a result of a review of time and attendance records submitted by Transco Security of Ohio and Transco Security, Inc. of Delaware, to support billing invoices of these corporations on GSA contract GS-05B-41886, adequate evidence has been produced which indicates that these corporations and their President, Fred Gaviglia, overbilled GSA for services not provided.

As I stated to you in my letter of March 6, 1980, I have determined in accordance with FPR 1-1.605-4(e), that substantial interests of the Government would be prejudiced if hearings were to be held in this case. However, I will consider any information or argument you wish to present, either orally or in writing, in person or through representation, in opposition to the suspension.

Please be advised that a copy of this letter will be provided to your attorney.

Very truly yours,

/s/ A. R. Marschall
A. R. MARSCHALL
Commissioner

cc:

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